Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of December one thousand nine hundred and seventy-five.

Present:

HON. LEONARD P. MOORE
HON. WILFRED FEINBERG
HON. ELLSWORTH A. VAN GRAAFEILAND

Circuit Judges.

75-7170

JOSEPH RODRIGUEZ,

Plaintiff-Appellee,

v.

OLAF PEDERSEN'S REDERI A/S,

Defendant-Third Party Plaintiff-Appellee,

v.

AMERICAN STEVEDORES, INC., and A.M. KRISTOPHER CO., INC.,

Third Party Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of New York.

Judgment of the Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

A. Daniel Fusaro
Clerk

By /s/ Vincent A. Carlin
Chief Deputy Clerk

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Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 78—September Term, 1975.

(Argued October 23, 1975 Decided December 9, 1975.)

Docket No. 75-7170

JOSEPH RODRIGUEZ,

Plaintiff,

—against—

OLAF PEDERSEN'S REDERI A/S,

Defendant and Third Party Plaintiff-Appellee,

—against—

AMERICAN STEVEDORES, INC.,

Third Party Defendant-Appellant,

—and—

A. M. KRISTOPHER CO., INC.,

Third Party Defendant.

Before:

MOORE, FEINBERG and VAN GRAAFEILAND,

Circuit Judges.

Opinion of the Court of Appeals

Appeal from summary judgment for shipowner on third-party action for indemnity from stevedore in longshoreman's negligence action, entered in United States District Court for the Eastern District of New York, Edward R. Neaher, *J.*

Affirmed.

JOSEPH ARTHUR COHEN, New York, N.Y. (Alexander, Ash, Schwartz & Cohen; Sidney A. Schwartz, on the brief), *for Third Party Defendant-Appellant.*

THOMAS F. MOLANPHY, New York, N.Y. (Haight, Gardner, Poor & Havens; William P. Kain, Jr., on the brief), *for Defendant and Third Party Plaintiff-Appellee.*

FEINBERG, *Circuit Judge:*

In this case we again have the three-cornered lawsuit involving an injured longshoreman, the shipowner and the stevedore. The complexity of the issues before us is lessened somewhat because on appeal only the stevedore and the shipowner remain in the litigation, the stevedore appealing from the grant of summary judgment for the shipowner on the latter's third-party complaint, by the United States District Court for the Eastern District of New York, Edward R. Neaher, *J.* We affirm.

I

Since the facts of the case are set out in detail in Judge Neaher's thorough opinion, 387 F. Supp. 754, we will discuss them only briefly. Joseph Rodriguez, a longshoreman employed by appellant American Stevedores, Inc. (Stevedore) was injured in July 1967 when he fell through an

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open hatch square in the upper tween deck of hatch #2 of a vessel owner by appellee Olaf Pedersen's Rederi A/S (Shipowner). Earlier in the day, Rodriguez had worked in that hatch, but the longshoremen had completed their work there and moved on to other tasks in another hatch. Telling his supervisor that he had left his hook and gloves in the #2 hatch, Rodriguez made his way back along a darkened corridor, with only a small penlight for illumination, ignoring a less direct but safer route. In the meantime, at the order of the vessel's chief officer, ship cleaners had removed the covers from the #2 hatch tween deck, which had been covered when the longshoremen were working; the cleaners had also covered the corresponding opening in the weather deck, so that the #2 hatch was now dark. When Rodriguez arrived on the tween deck of the darkened #2 hatch, he tripped and fell through the uncovered opening into the lower hold.

At the resulting trial in 1971, a jury found the Shipowner negligent, but reduced Rodriguez's damages from $80,000 to $35,000 because of his contributory negligence. The same jury denied the Shipowner's claim that it was entitled to indemnity from the Stevedore because the latter had breached its warranty of workmanlike performance, but the judge, the late George Rosling, set aside the verdict and ordered a new trial.[1] Before the new trial could begin, however, Judge Rosling died, and the case was assigned to Judge Neaher. Neither party had additional evidence to submit, and the Shipowner, contending that on the record of the prior trial it was entitled to indemnity as a matter of law, moved for summary judgment, which was granted. This appeal by the Stevedore followed.

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1 The Stevedore argues that this was error. We need not discuss the propriety of this ruling, however; since we conclude that the Shipowner at that time was entitled to the judgment it then sought as a matter of law, any error in granting a new trial was in the Stevedore's favor.

II

The Stevedore raises two principal issues. First, it argues that the Shipowner is not entitled to indemnity because the Stevedore did not, as a matter of law, breach its warranty. As Judge Neaher correctly pointed out, a long line of cases in this circuit holds that as a matter of law, a stevedore's warranty is breached when it supplies a negligent employee, and that therefore a jury finding of contributory negligence on the part of a longshoreman-plaintiff requires that verdict be directed against his stevedore employer on this issue. *King* v. *Deutsche Dampfs-Ges,* Dkt. Nos. 75-7127, 75-7151, slip op. 5479, 5484-85 (2d Cir. Aug. 8, 1975); *Hartnett* v. *Reiss S.S. Co.,* 421 F.2d 1011, 1017-18 (2d Cir.), cert. denied sub nom. *Grain Handling Co.* v. *Hartnett,* 400 U.S. 852 (1970); *McLaughlin* v. *Trelleborgs Angfartygs A/B,* 408 F.2d 1334 (2d Cir.), cert. denied, sub nom. *Golten Marine Co.* v. *Trelleborgs Angfartygs A/B,* 395 U.S. 946 (1969); *Mortensen* v. *A/S Glittre,* 348 F.2d 383 (2d Cir. 1965).[2] The Stevedore's reliance on *Nye* v. *A/S D/S Svendborg,* 501 F.2d 376 (2d Cir. 1974), cert. denied sub nom. *The Svendborg* v. *Marine Engine Specialties Corp.,* 420 U.S. 964 (1975), is misplaced, for that case explicitly distinguished cases involving the warranty. 501 F.2d at 380. Once the jury determined that Rodriguez, the Stevedore's employee, was contributorily negligent, no further issue of fact was presented; as a matter of law, the Stevedore breached its warranty.

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2 Accord, *Santiago Martinez* v. *Compagnie Generale Transatlantique,* 517 F.2d 371 (1st Cir. 1975), petition for cert. pending, 44 U.S.L.W. 3243 (Oct. 21, 1975); *United States Lines, Inc.* v. *Jarka Corp. of Baltimore,* 444 F.2d 26 (4th Cir. 1971); *Arista Cia. De Vapores, S.A.* v. *Howard Terminal,* 372 F.2d 152 (9th Cir. 1967). Contra, *Julian* v. *Mitsui O.S.K. Lines, Ltd.,* 479 F.2d 432 (5th Cir.), cert. denied sub nom. *Mitsui O.S.K. Lines, Ltd.* v. *Strachan Shipping Co.,* 414 U.S. 1093 (1973); *Shaw* v. *Lauritzen,* 428 F.2d 247 (3d Cir. 1970).

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III

The Stevedore's second argument is that even if it did breach its warranty, there remains an issue of fact as to whether there was "conduct on [the Shipowner's] part sufficient to preclude recovery." *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, 567 (1958). Although the Supreme Court in *Weyerhaeuser* did not make clear what sort of conduct would be "sufficient to preclude recovery," we have held that in order to justify that result, the shipowner's fault

> must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough.

Albanese v. *N.V. Nederl. Amerik Stoomv. Maats.*, 346 F.2d 481, 484 (2d Cir.), rev'd on other grounds, 382 U.S. 283 (1965). See also *Albanese* v. *N.V. Nederl. Amerik Stoomv. Maats.*, 392 F.2d 763, 765 (2d Cir.), rev'd on other grounds sub nom. *International Terminal Operating Co.* v. *N.V. Nederl. Amerik Stoomv. Maats.*, 393 U.S. 74 (1968); *Hartnett* v. *Reiss S.S. Co.*, supra, 421 F.2d at 1017; *Mortensen* v. *A/S Glittre*, supra, 348 F.2d at 385. If this is to be the standard, a directed verdict for the Shipowner was in order here despite the Stevedore's claim that a jury question was presented. The Shipowner's fault was the creation of a potentially hazardous condition by uncovering the hatch square on the tween deck in hatch #2 and blocking off the light coming from above. Nothing about this negligence on the Shipowner's part prevented or hindered Rodriguez from rendering a workmanlike performance, that is, from using the safe route between hatches that was available, or at least securing adequate illumination before venturing down a dark corridor into a dark hatch.

The Stevedore argues, however, that a jury question was presented under our recent decisions in *Conceicao* v. *New Jersey Export Marine Carpenters, Inc.*, 508 F.2d 437 (2d Cir. 1974), cert. denied, sub nom. *Cia de Nav. Mar. Netumar* v. *Conceicao*, 421 U.S. 949 (1975), and *Hurdich* v. *Eastmount Shipping Corp.*, 503 F.2d 397 (2d Cir. 1974). In *Conceicao*, plaintiff longshoreman was injured by a rolling steel pipe when wooden pipe cribs broke because they were stowed with too many pipes by the stevedore employer. The plaintiff was not contributorily negligent. Although the jury found that the stevedore had breached its warranty, the jury also found that the shipowner's conduct precluded recovery, and we affirmed. The conduct held sufficient to preclude the shipowner's indemnity consisted essentially of its failure to give the stevedore proper information regarding the overall amount of pipes to be stowed and the location of available pipe beds and the shipowner's lack of supervision of the loading. This was a direct hindrance of a stevedore attempting to do in a workmanlike manner the very job for which he was engaged. The conduct of the Shipowner's personnel here, while negligent, was far more remote from the Stevedore's actual work and did not hinder or prevent Rodriguez from performing his job satisfactorily.

Similarly, our recent decision in *Hurdich* does not compel the conclusion that Judge Neaher improperly applied the "prevent or hinder" test. In that case, as will be seen below, the court did not purport to apply the "prevent or hinder" standard at all and did not refer to our decisions in *Albanese*, *Mortensen* or *Hartnett*. In addition, as we also explain below, *Hurdich* on its facts is distinguishable from the present case.

The Stevedore also argues, however, that "prevent or hinder" should not be the standard, relying on *Conceicao* and *Hurdich*. According to the Stevedore, these decisions

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indicate that we have abandoned the "prevent or hinder" rule in favor of a different test for indemnity-precluding conduct, and under the new test the judgment against it was improper.

While both *Hurdich* and *Conceicao* evidence this court's concern about the apparently harsh impact on stevedores of the rules in this area, neither case compels the conclusion that we have adopted a new definition of conduct sufficient to preclude indemnity, at least in cases like the one at bar. The jury verdict for the stevedore that we affirmed in *Conceicao* was rendered after instructions that indemnity for the shipowner was precluded if it "by some action or inaction . . . prevented, hindered, or seriously handicapped [the stevedore] in performing its workmanlike job." 508 F.2d at 443. Although the court felt, in words borrowed from the Supreme Court's decision in *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*, 376 U.S. 315 (1964), that the shipowner was "the party . . . most able to minimize the particular risk involved," id., this language does not appear to have been intended as the adoption of a new rule.

In *Hurdich*, there is some indication of an intention to break new ground, since the opinion, quoting from *Italia Societa*, supra, says that the test that "should have been applied by the district court below but was not . . . is that 'liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury.'" 503 F.2d at 401. As already indicated, however, we do not believe that *Hurdich* is inconsistent with the result we reach here. In that case, the shipowner had engaged a contractor (stevedore) to replace an antenna insulator. The work was done on two separate days. On the first day, the old insulator was removed by an employee of the stevedore and two of the ship's crew. This process created debris, which the three workers

cleaned up. The stevedore's employee returned alone three days later to complete the work, creating no additional debris and performing no further clean-up. Two weeks later, the plaintiff, an employee of the shipowner, fell on some of the insulation debris that was supposed to have been cleaned up. The plaintiff was not contributorily negligent. This court ruled that the shipowner's conduct precluded indemnity from the stevedore.

The case is fairly distinguishable. The plaintiff in *Hurdich* was a member of the ship's crew, rather than, as in this case, a contributorily negligent employee of the stevedore, and the stevedore's breach of warranty was remote from the accident to which it contributed. In fact, the accident occurred two weeks after the stevedore's unworkmanlike performance. During all of this period, the shipowner's employees had exclusive control over the area and the ship "alone was capable" of correcting the dangerous condition, which it negligently failed to do. 503 F.2d at 402. In such a case, the shipowner did not "prevent or hinder" workmanlike performance by the contractor, but neither was its fault "merely concurrent." Rather, it was an intervening cause. See *La Capria* v. *Compagnie Maritime Belge*, 427 F.2d 244, 247 (2d Cir. 1970). When the stevedore's breach of warranty consists of the contributory negligence of its own employee, the plaintiff, such an analysis is usually not fruitful. Here, for example, Rodriguez's unworkmanlike performance was the immediate, and, by the jury's estimate holding him over 50 per cent contributorily negligent, the more important cause of the accident.

While the panel in *Hurdich* did disapprove of the test used by the district judge there, which was the "prevent or hinder" test,[3] the opinion does not explicitly disavow

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3 See *Hurdich* v. *R.C.A. Corp.*, 359 F. Supp. 1222, 1224 (S.D.N.Y. 1973).

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the earlier line of cases already discussed. Nor was there occasion to. In *Hurdich*, where the shipowner's negligent conduct occurred well *subsequent* to the stevedore's breach of warranty, the "prevent or hinder" test, which was formulated in cases where the shipowner's conduct occurred *prior to* or *contemporaneous with* the breach, was ill-adapted for reaching an equitable result. Judge Neaher correctly assumed that the "prevent or hinder" standard was consistent with our decision in *Hurdich*, and that both are consistent with the policy announced by the Supreme Court in *Italia Societa* of placing responsibility on the party best able to minimize the risk involved. Under the circumstances of this case, we believe that we must still apply the "prevent or hinder" standard, as Judge Neaher did.[4]

IV

The Stevedore argues that the interplay of the rules discussed above leads to a result which is anomalous and unfair, in that the Shipowner, which negligently created a dangerous condition and failed to warn business invitees, is indemnified from the consequences of its negligence by the Stevedore, which was not otherwise at fault, only because the Stevedore's employee was contributorily negligent in falling into the trap the Shipowner had created. Thus, the plaintiff's contributory negligence not only reduces the amount of the judgment against the Shipowner

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4 Our conclusion that the Shipowner's conduct did not preclude indemnity as a matter of law disposes of the Stevedore's contention that it was deprived of its right to have a jury determination of the issue. Although the Stevedore is correct that this is ordinarily an issue of fact, *Weyerhaeuser S.S. Co.* v. *Nacirema Operating Co.*, 355 U.S. 563, 567 (1958); *Hurdich* v. *Eastmount Shipping Corp.*, 503 F.2d 397, 401 n.3 (2d Cir. 1974), the court of course remains free to direct a verdict where the evidence is insufficient to raise a jury question, and we have approved the trial judge's decision to do so in appropriate cases. See, e.g., *Mortensen* v. *A/S Glittre*, 348 F.2d 383 (2d Cir. 1965).

but also entitles it to shift the remainder of the damages, as well as the legal expenses it incurred in defending the action, to the otherwise innocent Stevedore. The Shipowner responds that the equities do not support the Stevedore at all. Thus, the Shipowner stresses that whatever it "should or should not have done, a workmanlike performance [by Rodriguez] would have eliminated the risk of injury."[5] Moreover, as Judge Neaher noted:

> Rodriguez did not enter hatch #2 in order to perform any assigned task. [The Shipowner] had no reason to expect longshoremen to be in that hold, since the stevedore's work there had been completed. And if the *Italia* test is to be applied, Rodriguez and his gang boss were best situated to avoid the danger by inspection of the area with an adequate light.

387 F. Supp. at 760.

We have long been troubled by this problem, which is aggravated by the all-or-nothing character of the indemnity doctrine. Cf. *Hurdich*, supra, where there was occasion to use the tort concept of contribution rather than the contract notion of indemnity. 503 F.2d at 403. As early as *McLaughlin*, supra, we expressed our misgivings about the "apparently irrational result" in these cases, but concluded that the roots of the difficulty lay in decisions of the Supreme Court,[6] and that for this reason "inferior federal courts will do better to abstain from further adventures

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5 Brief of Defendant and Third-Party Plaintiff-Appellee, at 13.

6 Responsibility for longshoremen's injuries has been differently allocated at different times, with each successive solution causing new problems. For the history of the judicial and legislative attempts to deal with the problem, see Stover, Longshoreman-Shipowner-Stevedore: The Circle of Liability, 61 Mich. L. Rev. 539 (1963). See also *Fairmont Shipping Corp.* v. *Chevron International Oil Co.*, 511 F.2d 1252 (2d Cir.), cert. denied, 44 U.S.L.W. 3203 (U.S. Oct. 6, 1975).

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in this wonderland and leave doctrinal development to the Supreme Court" and to Congress. 408 F.2d at 1338.

Congress has responded to the need. In 1972, it substantially revised the allocation of liability for accidents of this sort. 33 U.S.C. § 905(b).[7] The new statutory scheme deals with these problems in a comprehensive way that would be impossible for a court. Since future cases will be governed by the statute, the reexamination of the settled law of this circuit which the Stevedore invites us to make would have only the most limited practical effect. Under these circumstances, we decline to depart from the precedents which Judge Neaher correctly found controlling.

The judgment of the district court is affirmed.

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7 33 U.S.C. § 905(b) provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

Opinion of Judge Neaher Reported at 387 F. Supp. 754

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

68 C 409

JOSEPH RODRIGUEZ,

Plaintiff,

—against—

OLAF PEDERSEN'S REDERI A/S,

Defendant and Third Party Plaintiff,

—against—

AMERICAN STEVEDORES, INC. and A. M. KRISTOPHER CO., INC.,

Third Party Defendants.

APPEARANCES:

HAIGHT, GARDNER, POOR & HAVENS, ESQS.
Attorneys for Defendant and Third-Party Plaintiff
By W. P. KAIN, JR. and THOMAS F. MOLANPHY, ESQS.

ALEXANDER, ASH, SCHWARTZ & COHEN, ESQS.
Attorneys for Third-Party Defendant
By JOSEPH ARTHUR COHEN, ESQ.

NEAHER, *District Judge.*

This action was originally instituted by a longshoreman (Rodriguez) to recover damages from defendant shipowner

(Pedersen) for injuries he sustained while aboard the latter's ship. Pedersen, in turn, impleaded Rodriguez's employer, American Stevedores, Inc. (American) seeking indemnification for the monetary damages Pedersen was required to pay to Rodriguez. The case is now before the court solely on the indemnity claim; but in order to better understand the questions presented, the prior proceedings and present posture of the case will be briefly stated.

After a trial in 1971 before the late Judge Rosling of this court, the jury returned a verdict in favor of Rodriguez against Pedersen in the amount of $35,000. In answer to special interrogatories, the jury found the ship unseaworthy and the shipowner negligent but also found Rodriguez contributorily negligent and reduced his damages from $80,000 to the amount announced. Upon subsequent submission of Pedersen's claim for indemnity, the jury returned a separate verdict in favor of American, denying Pedersen a recovery over. Pedersen then moved for judgment *n.o.v.* or a new trial on the indemnity claim. Judge Rosling granted Pedersen the new trial.[1]

Pedersen has now moved for summary judgment on its indemnity claim, asserting that there are no new facts to be adduced at a new trial and that on the facts as brought out on the first trial, it is entitled to judgment as a matter of law. American opposes Pedersen's motion and has cross-moved under Rule 60(b), F.R.Civ.P., to set aside the order granting Pedersen a new trial and for reinstatement of the jury verdict denying indemnity. In so moving, American also acknowledges "that no purpose would be served by a new trial other than to have the record of the first

[1] Judgment was entered for plaintiff on the jury verdict and was not appealed. Judge Rosling died before a new trial could be commenced and the case was subsequently reassigned to the writer.

trial read to a different jury." [2] In short, both sides agree that all relevant facts are before the court.[3]

Before turning to the facts, the somewhat unusual posture of the case requires threshold consideration of the propriety of entertaining a motion for summary judgment at this juncture. The indemnity claim clearly remains as a completely separate action, having been "severed and deferred for later jury trial" by Judge Rosling.[4] Although such a trial was had, no judgment has ever been entered determining the action. The jury's verdict denying indem-

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[2] Affidavit in Support of Third Party Defendant's Motion, dated February 6, 1974, at 2.

[3] In its statement pursuant to General Rule 9(g) of this court, Pedersen stipulated that:

> "4. From the testimony and jury findings at the first trial, defendant and third party plaintiff stipulates, for the purposes of this motion, that it negligently created an unseaworthy condition which was a proximate cause of plaintiff's accident in that: The vessel's Chief Officer directed the foreman of ship cleaners employed by third party defendant . . . to cover the No. 2 hatch on the weather deck and not replace such covers in the lower decks of that hatch as had been removed during the course of cleaning operations; that such action left the No. 2 in total darkness and that the doors of the No. 4 'tween deck, which gave plaintiff initial access back to the No. 2 hatch, were not locked, were ajar, and there were no signs warning persons, such as plaintiff, that the conditions described above, existed."

American does not dispute any of the foregoing facts or claim there are any additional facts. All that American says in its Rule 9(g) statement is that:

> "Our position is that both the Shipowner and the Stevedore are bound by the jury determinations of Shipowner's negligence and plaintiff's contributory negligence, and that those findings evidence the existence of a factual issue on indemnity precluding conduct." Affidavit of Joseph Arthur Cohen, Esq.

[4] See Decision and Order ("Decision") filed September 28, 1971, at 2.

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nity was set aside and a new trial ordered with a strong suggestion that the existing evidence was insufficient to support such a verdict.[5] The parties say that additional evidence does not exist. A judgment deciding the case one way or the other would seem to be in order.

American, in opposing the use of summary judgment procedure, suggests that the court merely "recall the order granting a new trial" and direct entry of judgment on the vacated jury verdict in its favor.[6] It contends that Judge Rosling having denied Pedersen's motion for judgment notwithstanding the verdict, the latter's declared intention not to offer additional proof is a waiver of its right to a new trial. Consequently, American argues, it should be relieved of the new trial order under Rule 60(b), the jury verdict in its favor should be reinstated, and judgment should be entered accordingly.[7]

Aside from the technical difficulties American's Rule 60(b) contentions present,[8] the court sees only two routes to an appealable judgment on the indemnity claim: (1) resubmission of the same evidence to a new jury, which neither party desires and which seems to make no sense here, or (2) re-examination by the court of the facts not in dispute, whether established by jury verdict or otherwise, to determine if judgment on the merits can be rendered as a matter of law. Pedersen's motion for summary

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[5] Decision at 4-5.

[6] Affidavit in Support of Third Party Defendant's Motion, dated February 6, 1974, at 3.

[7] Brief in Support of Third Party Defendant's Motion under Rule 60 at 2.

[8] Defendant and Third Party Plaintiff's Memorandum of Law, etc. at 3-4.

judgment urges route (2) and impresses the court as the better course.

Although a judge should not ordinarily disturb previous rulings of another judge in the same case, "the law of the case" rule is not so inflexible as to permit of no exception. Certainly it should not prevent the discharge of a judge's obligation to present an appellate court with the judgment he believes ought to be rendered in the case. *Dictograph Products Co.* v. *Sonotone Corp.*, 230 F.2d 131 (2 Cir.), *appeal dism.* 352 U.S. 883 (1956), cited by Pedersen, supports such a view. See also *Petition of Kinsman Transit Company*, 368 F.2d 821 (2 Cir. 1968), fn. 9 at p. 825; *Ross Products, Inc.* v. *New York Merchandise Co.*, 242 F. Supp. 878 (S.D.N.Y. 1965); *Kaminsky* v. *Abrams*, 281 F. Supp. 501 (S.D.N.Y. 1968); *Rogers* v. *Valiente*, 426 F.2d 1361 (2 Cir. 1970), fn. 2 at p. 1363.

Finding no sound reason for holding that the prior rulings herein bar reconsideration of the merits of Pedersen's claim, we now examine what the parties agree are the facts which gave rise to that claim.

On July 3, 1967, Rodriguez and other members of his gang were discharging cargo from Pedersen's M/V "Sunny Prince." The gang was working on the upper 'tween deck level of hatch #2, when Rodriguez was summoned from that hatch at about 11:00 a.m. and directed to hatch #4 to do some unloading. When Rodriguez left hatch #2 he left his gloves and hook there, anticipating that he would return to work in that hatch. Shortly after arriving at hatch #4, he realized he would not be returning to hatch #2, and after having his lunch, he requested permission from his superior to go back to hatch #2 to retrieve his gloves and hook.

Meanwhile, unknown to Rodriguez, ship's cleaners in the employ of A. M. Kristopher Co., Inc., had gone into hatch

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#2 to clean out the debris remaining after the completion of the unloading. In order to do so it was necessary for them to remove the covers from the upper 'tween deck. After they had completed the task, they asked the ship's chief officer whether they should replace the covers and were told by him not to do so. He also instructed them to close the main deck hatch opening. This, of course, left the #2 upper 'tween deck level in total darkness with a previously covered floor aperture now open.

As Rodriguez proceeded from hatch #4 to hatch #2, he walked through a door which had been left ajar and which gave access to a passageway connecting the two hatches at the 'tween deck level. Concededly there were no signs giving notice of the changed conditions in hatch #2. As it was dark in the passageway, Rodriguez used a small "penlight" for illumination. After arriving in the #2 hatch 'tween deck area, he tripped over the hatch coaming and fell through the uncovered opening into the lower hold, thereby sustaining his injuries.

Until Congress, in 1972, revised the statutory provision relating to actions of this nature,[9] the law in this circuit was well established that a finding of contributory negli-

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[9] 33 U.S.C. §905(a) and (b) now provide in pertinent part:

"(a) The liability of an employer prescribed in section 904 of this title shall be exclusive . . . .

"(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person . . . may bring an action against such vessel as a third party . . . and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void . . . ."

The instant action involves injuries sustained prior to the effective date of the statutory provision and is thus not governed thereby. See *Julian* v. *Mitsui O.S.K. Lines Ltd.*, 479 F.2d 433, 434 (5 Cir. 1973).

gence on the part of a plaintiff longshoreman caused his employer, the stevedore company, to be held liable per se to indemnify the defendant shipowner, *Hartnett* v. *Reiss Steamship Company*, 421 F.2d 1011, 1018 (2 Cir.), *cert. denied*, 400 U.S. 852 (1970); *McLaughlin* v. *Trellebarge Arefartyge A/B*, 408 F.2d 1334, 1336 (2 Cir.), *cert. denied*,[10] 395 U.S. 946, 89 S.Ct. 2020, 23 L.Ed. 2d 464 (1969); *Mortensen* v. *A/S Glittre*, 348 F.2d 383 (2 Cir. 1965),[11] absent a finding that the shipowner prevented the stevedore company from fulfilling its warranty of workmanlike performance, *Weyerhaeuser S.S. Company* v. *Nacirema Operating Company, Inc.*, 355 U.S. 563, 567 (1958).

Here, it is undisputed that upon the liability trial, the jury found plaintiff's contributory negligence to be in excess of 55%. Without more, Pedersen would be entitled to a judgment over against American. A jury on the same evidence, however, denied the shipowner indemnity when that issue was presented to it.

Endeavoring to resurrect that verdict, American strenuously argues that "the jury determinations of shipowner's negligence and [Rodriguez's] contributory negligence . . . evidence the existence of a factual issue on indemnity precluding conduct," n. 4 *supra*.

While it is true that "the issue of whether the shipowner has precluded itself is an issue of fact," *Hurdich* v. *Eastmount Shipping Corp.*, 503 F.2d 397, at 401, n.3 (2 Cir. 1974) this is not to be taken as barring judicial evaluation of the sufficiency of the evidence relied on to support

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[10] *Sub nom. Golten Marine Company* v. *Trelleborgs Angfartygs.*

[11] The theory behind this vicarious imposition of liability is that the employer warrants "to furnish employees who . . . will not negligently expose themselves to injury." *McLaughlin, supra*, 402 F.2d at 1337.

a finding that the shipowner should be denied indemnity. Indeed, it seems manifest that Judge Rosling set the jury's verdict aside and ordered a new trial because he viewed the existing evidence as insufficient to warrant such a denial.[12] In effect, the stevedore—not the shipowner—was given a second opportunity to develop facts to support its contention that indemnity should be denied.

On this motion the parties are in agreement that there is no additional evidence. The court must, therefore, decide whether on the essentially conceded facts a jury could reasonably infer that Pedersen's part in Rodriguez's accident constituted "conduct on its part sufficient to preclude recovery" of indemnity from American. *Weyerhaeuser, supra,* 355 U.S. at 567.

Exactly what constitutes conduct sufficient to preclude recovery was not explained in *Weyerhaeuser.* Cases in this circuit, while not striving for a precise definition, have established a meaningful parameter. Thus, in *Albanese* v. *N.V. Nederl. Amerik Steamr. Manta,* 346 F.2d 481, 484 (2 Cir.), *rev'd on other grounds,* 382 U.S. 283 (1965), the Court of Appeals stated:

> "Whatever fault of a shipowner may be said to relieve the stevedore of his duty under the warranty, it seems plain that it must at the least prevent or seriously handicap the stevedore in his ability to do a workmanlike job. Merely concurrent fault is not enough . . . ."

The above-quoted language was later approved in *Mortensen* v. *A/S Glittre, supra,* in which a jury found for Mortansen, a painter, against the shipowner but re-

[12] Decision at 4-5.

duced its verdict by approximately one-third because of Mortensen's contributory negligence. The trial court then directed a verdict on an indemnity claim in favor of the shipowner against Mortensen's employer, a ship-painting contractor, on the theory that the jury's finding of contributory negligence mandated a finding as a matter of law that the employer had breached its warranty of workmanlike performance.

On appeal, the employer argued that the question of whether the shipowner's conduct was a bar to recovery should have been left to the jury. The Court of Appeals rejected the contention in language apposite here:

> "It is well established that the mere creation of the unsafe condition is insufficient to preclude recovery over when the contractor's own negligence has brought the unseaworthiness of the vessel into play. *E.g.*, *Crumady* v. *J. H. Fisser*, 358 U.S. 423, 79 S. Ct. 445, 3 L.E.2d 413 (1959).
>
> "Despite every opportunity to do so during the course of the trial, no effort was made to show and no claim was made that Glittre's conduct consisted of anything more than the creation of the hazard which underlay the unseaworthiness claim, let alone that it amount to 'active hindrance' of the contractor in the performance of its contractual duties, which as we stated in Albanese, supra, . . . is required to defeat the indemnification action." 348 F.2d at 385.

Requiring an active hinderance by the shipowner of the stevedore's performance is, manifestly, an appropriate standard in view of the fact that the stevedore's warranty is founded in contract, and not tort, law. *Italia Societa per Azioni di Navigazione* v. *Oregon Stevedoring Co.*,

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376 U.S. 315 (1964). We are thus concerned not with weighing relative degrees of fault but with ascertaining causation in fact, *i.e.*, whether the shipowner's conduct, as imputed from its employees, actually interfered with the proper performance of the stevedore's job.

In deciding this question of causation, the trier of the facts is charged by the Court in *Italia, supra,* to place liability "upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury" (376 U.S. at 324). See *Hurdich* v. *Eastmount Shipping Corp., supra,* Slip Op. at 5416.

Here, a finding of fault on Pedersen's part must necessarily center around the creation by the ship's own officer of a potentially hazardous condition in hatch #2. This trap for the unwary is reminiscent of the oil "slick" in *Mortensen, supra.* In *Mortensen* it was the careless failure of the plaintiff workman to obey a direction to clean up any "slick" observed which brought about the chain of events resulting in the accident. Here, too, it was Rodriguez's own careless action in walking into the darkened hatch which brought about his injuries.

In this case there is a total absence of evidence warranting an inference that the creation of the hazard constituted interference by the shipowner with the stevedore's fulfillment of his warranty of workmanlike performance. Rodriguez did not enter hatch #2 in order to perform any assigned task. Pedersen had no reason to expect longshoremen to be in that hold, since the stevedores' work there had been completed. And if the *Italia* test is to be applied, Rodriguez and his gang boss were best situated to avoid the danger by inspection of the area with an adequate light.

In *Bertino* v. *Polish Ocean Line,* 402 F.2d 963, 866 (2 Cir. 1968), the court noted:

> "Even if the danger was created by the shipowner, indemnity over is permitted if the condition was obvious and the stevedore continued to work on did not correct it."

That language is also apposite here. Even though the darkened conditions in hatch #2 was created by Pedersen, it presented an obviously dangerous situation to Rodriguez, calling for the exercise of caution and the use of an adequate light. He nevertheless entered the hatch aided only by a "penlight." Rodriguez's own careless action having brought the danger into play, the shipowner may not be denied indemnity for having created the danger. See *United States Lines, Inc.* v. *Jarka Corp.*, 444 F.2d 26 (4 Cir. 1971); *K&H Ship Service Co.* v. *Weyerhaeuser Line*, 382 F.2d 711 (9 Cir. 1967).

Evaluating the facts of this case against the standards of causation established by *Hartnett-McLaughlin- Mortensen, supra*, it seems clear that the concurrent fault of Pedersen cannot be said to have prevented or handicapped the stevedore in his ability to do a workmanlike job, and that no jury verdict denying indemnity to the shipowner would be legally sustainable.

Pedersen's motion for summary judgment is accordingly granted, the form of judgment to be settled by the parties on notice.

So ordered.

/s/ Edward R. Neaher
U. S. D. J.

Dated: Brooklyn, N.Y.
December 27, 1974

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Judgment of District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

JOSEPH RODRIGUEZ,

Plaintiff,

—against—

OLAF PEDERSEN'S REDERI A/S,

Defendant and Third Party Plaintiff,

—against—

AMERICAN STEVEDORES, INC. and A.M. KRISTOPHER CO., INC.,

Third Party Defendants.

Defendant and third party plaintiff, above named, by its attorneys, Haight, Gardner, Poor & Havens, having moved this Court by Notice of Motion dated November 27, 1973, for an order pursuant to Rule 56(a) of the Federal Rules of Civil Procedure for summary judgment on defendant and third party plaintiff's claim for indemnity against third party defendant, American Stevedores, Inc., and the Court having read the affidavit of William P. Kain, Jr., Esq., sworn to the 27th day of November, 1973 in support thereof and the affidavit of Joseph Arthur Cohen, Esq., sworn to the 6th day of February, 1974 in opposition thereto and third party defendant, American Stevedores, Inc., by its attorneys, Alexander, Ash, Schwartz & Cohen, having moved this Court for

an order pursuant to Rule 60(b) of the Federal Rules of Civil Procedure re-instating the jury verdict of March 1, 1971 in favor of American Stevedores, Inc. on the indemnity claim of defendant and third party plaintiff and the Court having read the affidavit of Joseph Arthur Cohen, Esq., sworn to the 6th day of February, 1974 in support thereof and the Court having further heard oral argument of counsel in support of and in opposition to both said motions and due deliberation having been had thereon as well as on the authorities submitted by the parties in their various memoranda of law, and the Court, in its opinion dated December 27, 1974, having determined that the motion of defendant and third party plaintiff should be granted and that the motion of third party defendant should be denied,

Now, on motion of Haight, Gardner, Poor & Havens, attorneys for defendant and third party plaintiff it is,

ORDERED, ADJUDGED AND DECREED that

(1) Defendant and third party plaintiff's motion for summary judgment against third party defendant, American Stevedores, Inc., be and the same is hereby granted;

(2) Defendant and third party plaintiff have judgment against third party defendant, American Stevedores, Inc., in the amount of $37,094.60, the full amount of plaintiff's recovery including interest and costs as taxed, plus interest at 6% per annum from January 27, 1972, the date said judgment was satisfied, and, in addition thereto, reasonable counsel fees, costs and disbursements incurred in the defense of plaintiff's claim:

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(3) The respective amounts of recoverable counsel fees and disbursements may be added to the foot hereof in sums to be agreed upon or, failing such agreement, in such sums as may be fixed by the Court;

(4) That the motion of third party defendant, American Stevedores, Inc., be and the same is hereby denied.

Dated: Brooklyn, New York
February 3, 1975

/s/ EDWARD R. NEAHER
U.S.D.J.

Opinion of Judge Rosling

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

JOSEPH RODRIGUEZ,

Plaintiff,

—against—

OLAF PEDERSEN'S REDERI A/S,

Defendant and Third Party Plaintiff,

—against—

AMERICAN STEVEDORES, INC. and
A. M. KRISTOPHER COMPANY, INC.,

Third Party Defendants.

Appearances:

DICOSTANZO, KLONSKY & CUTRONA, ESQS.
Attorneys for Plaintiff

HAIGHT, GARDNER, POOR & HAVENS, ESQS.
Attorneys for Defendant and
Third Party Plaintiff
William P. Kain, Jr., Esq.
Of Counsel

ALEXANDER, ASH, SCHWARTZ & COHEN, ESQS.
Attorneys for Third Party Defendant
Joseph Cohen, Esq.
Of Counsel

Decision and Order

Opinion of Judge Rosling

ROSLING, *J.*

On February 26, 1971, the jury rendered a verdict in favor of the plaintiff, Joseph Rodriguez, against Olaf Pedersen Rederi, the defendant shipowner, in the sum of $35,000. In addition to rendering such general verdict it answered written interrogatories submitted to it by the court pursuant to Fed. R. Civ. P. 49(b) in which it found the longshoreman plaintiff contributorily negligent and reported that it had by reason of such contributory negligence reduced the award of damages plaintiff had sustained to the sum announced as its verdict. On March 1st the court submitted to the same jury which had been held over to hear the third party claim by the shipowner against the American Stevedores, Inc., third party defendant,[1] for indemnity, a further interrogatory asking the jury to report the amount of damages they had found before reduction for contributory negligence. The jury answered that the unreduced damages totalled $80,000.

The court thereupon severed and deferred for later jury trial so much of the shipowner's claim-over as sought indemnification for counsel fees and disbursements for defending the primary suit and proceeding to try the issue of the shipowner's claim to indemnification as to the longshoreman's recovery of damages for his injuries. Such issue was submitted to the jury without the introduction of further evidence by either party. Before the submission both these parties moved for directed verdicts which the court denied.

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[1] The crosselaim of the stevedore against the third party co-defendant A. M. Kristopher Co., Inc., and the counter cross-complaint by the latter against the stevedore were discontinued in the course of the trial.

The shipowner now moves under Fed. R. Civ. P. 50 for the following relief:

(1) To renew its motion for a directed verdict on the indemnity claim; and

(2) Judgment, notwithstanding the verdict; or

(3) A new trial of the issues raised by the indemnity claim.

The jury by its finding of substantial contributory negligence on the part of the primary plaintiff imposes a vicarious equal fault on the stevedore employer and forecloses escape from the shipowner's claim that the stevedore's performance was not of the requisite workmanlike quality. Only by a showing that the shipowner by its own affirmative act had thwarted such performance can the stevedore be absolved of liability.[2] The jury by its finding of contributory negligence compels the conclusion that it must have determined that Rodriguez's entry into the dark interior passageway with his inadequate flashlight and his proceeding from the exit door of hatch #4 to the uncovered

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[2] Weyerhaeuser S. S. Co. v. Nacirema Operating Co., 355 U.S. 563, 567, 78 S. Ct. 438, 441 (1958); Hartnett v. Reiss Steamship Co., 421 F.2d 1011 (2d Cir. 1970), cert. denied, 400 U.S. 849; McLaughlin v. Trelleborgs Angfartygs A/B, 408 F.2d 1334, 1336 (2d Cir. 1969), cert. denied, 395 U.S. 946 (1969); Albanese v. N. V. Nederl. Amerik Stoomv. Maats, 392 F.2d 763 (2d Cir. 1968), rev. on other grounds, 393 U.S. 72 (1968); Mortensen v. A/S Glittre, 348 F.2d 383 (2d Cir. 1965); Nicroli v. Den Norske Afrika-Og Australielinie, 332 F.2d 651, 655 (2d Cir. 1964); Misurella v. Isthmian Lines, Inc., 328 F.2d 40 (2d Cir. 1964); Shenker v. United States, 322 F.2d 622 (2d Cir. 1963); Damanti v. A/S Inger, et al., 314 F.2d 395, 399 (2d Cir. 1963); Drago v. A/S Inger, 305 F.2d 139 (2d Cir. 1962); H. & H. Ship Service Co. v. Weyerhaeuser, 382 F.2d 711 (9th Cir. 1967); Calmar Steamship Corp. v. Nacirema Operating Co., 266 F.2d 79, 81 (4th Cir. 1959).

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'tween deck of hatch #2 where he fell constituted such contributory negligence.

Whether the shipowner's negligence and the unseaworthiness of the ship lay in the failure of the ship to post an appropriate warning on the exit door of hatch #4 or its failure to provide lighting in the passageway to hatch #2 or, finally, in failing to keep the 'tween deck of hatch #2 covered even though the longshoremen's unloading of hatch #2 had been completed some hours before the accident is unclear. The critical point, however, with respect to which the ship might be held by its action or inaction to have thwarted workmanlike performance by the shipowner, is the unbarred 'tween deck exit door of hatch #4, for once beyond this door the longshoreman's contributory negligence came into play as he aproached the uncovered hatch in which he was hurt.

Whether the door should have been barred by the shipowner or stevedore against its use in the fashion described and whether, in any event, a warning notice should have been posted or an oral notice given to the longshoremen of the dangers involved in their wandering off into holds other than the one in which they were working is not the decisive question upon which liability will turn. The stevedore for its part had a later opportunity than the ship to bar the door or to give the warning or to do both. Was it sufficiently on notice of the condition so that its failure to act constituted an unworkmanlike performance of its contractual obligation?

The question is a close one and should be presented to a jury in the form of an interrogatory calling for a written answer. Counsel should perhaps provide the jury with factual enlightenment by evidence of the physical situation with focus directed to the door.

Opinion of Judge Rosling

Motions for a directed verdit and for judgment notwithstanding the jury verdict are denied. Motion for a new trial on the issues raised by the indemnity claim is granted.[3] Case is set down for assignment for trial and fixation of a trial date on October 8, 1971, at 2:15 P.M.

The foregoing decision constitutes the findings of fact, conclusions of law and order of the court.

GEORGE ROSLING
U. S. D. J.

[3] The issues of counsel fee to be awarded to the shipowner and disbursements to be reimbursed were deferred by the court for later trial by a second jury. In view of the long delay which has already supervened since the trial of the claim-over for indemnification and the necessity for the retrial of that issue, the court recalls its earlier direction for deferral and now directs that the entire claim-over be tried or retried in a single jury trial to be held on a date fixed in the order to be entered hereon.

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